Supreme Court, U.S.
FILED

94 199 JUN 20 1994

NO. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

REDA F. PARSONS AND PRESTON L. BOWDEN,
CO-EXECUTORS OF THE
ESTATE OF ANNIE V. BOWDEN,

Petitioners,

v.

DELAWARE DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,
DIVISION OF SOCIAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

John E. Messick
(Counsel of Record)
Harold W. T. Purnell, II
Pine and Race Streets
P.O. Box 151
Georgetown, Delaware 19947
(302) 856-7313

JUNE 16, 1994

110 pp

QUESTION PRESENTED

Whether 42 U.S.C. § 1396r-5, which provides a complex formula for calculating the eligibility of an institutionalized spouse to qualify for Medicaid benefits, has been correctly interpreted by a State which denied benefits to an institutionalized, medically and financially needy person whose husband would not contribute toward her care, despite the provisions of 42 USC § 1396r-5(C)(3) which specifically allow for Medicaid benefits to someone who would otherwise be declared ineligible, when denial of benefits would result in undue hardship.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of the State of Delaware are those in the caption. In the proceeding below, the applicant for Medicaid Program benefits was Annie V. Bowden. The petitioners were substituted as parties after her death on September 28, 1992.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 3

STATUTE INVOLVED 4

STATEMENT OF THE CASE. 4

REASONS FOR GRANTING THE WRIT. 9

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Bowden v. Del. Dep't. of Health and Social Services, Del. Super., C.A. No. 92A-08-001, Graves, J., (Aug. 25, 1993). . . . 8

ADMINISTRATIVE DECISIONS

In RE: Annie V. Bowden (Del. Division of Social Services, July 3, 1992). 5

STATUTES AND REGULATIONS

28 U.S.C. § 1257(a) (1988) 3

42 U.S.C. § 1396r-5 (1989) . . 4, 5, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17

42 C.F.R. § 435.604(a)(1990) . . . 13

OTHER AUTHORITIES

Omnibus Budget Reconciliation Act, Pub. L. No. 103-66 (Aug. 10, 1993). 17

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

REDA F. PARSONS AND PRESTON L. BOWDEN,
CO-EXECUTORS OF THE
ESTATE OF ANNIE V. BOWDEN,

Petitioners,

v.

DELAWARE DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,
DIVISION OF SOCIAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

This Petition for a writ of Certiorari seeks this Court's review of the judgment of the Supreme Court of the State of Delaware on a nationally important matter relating to the

interpretation of a federal statute providing for Medicaid Program benefits to be administered by a State Medicaid Agency.

OPINIONS BELOW

The unreported Order of the Supreme Court of the State of Delaware denying petitioners' motion for reargument and motion for a rehearing en banc was issued on May 3, 1994. It appears at P. 19. The unreported Order of the Supreme Court of the State of Delaware, affirming the Superior Court of the State of Delaware in and for Sussex County, was issued on March 18, 1994. It appears at P. 21.

The unreported opinion of the Superior Court of the State of Delaware in and for Sussex County, which upheld the denial of Medicaid Program benefits for Annie V. Bowden, was issued on August

25, 1993. It appears at P. 23.

The decision of the Delaware Department of Health and Social Services, Division of Social Services, which affirmed the decision of the Division of Social Services to deny Medicaid Program benefits for Annie V. Bowden, was issued on July 13, 1992. It appears at P. 42.

JURISDICTION

The Order of the Supreme Court of the State of Delaware affirming the judgment of the Superior Court of the State of Delaware in and for Sussex County was entered on March 18, 1994. It appears at P. 21. A motion for reargument and a motion for rehearing en banc, timely filed, were denied on May 3, 1994. The Order denying these motions appears at P. 19. The jurisdiction of this Court is invoked under 28 U.S.C. §

1257(a).

STATUTE INVOLVED

The statute involved is 42 U.S.C. § 1396r-5, being the Medicaid Program, Title XIX of the Social Security Act. It is set forth at P. 70.

STATEMENT OF THE CASE

This case originated upon the presentation of an application on behalf of Annie V. Bowden to the Delaware Department of Health and Social Services for federal Medicaid Program benefits. After denial of the application, a fair hearing before the Division of Social Services was held wherein Annie V. Bowden contended that the Medicaid law was established to provide benefits to otherwise needy persons and that she should be entitled to program benefits in light of her husband, Ollie Bowden's,

refusal to pay for her nursing home care. The hearing officer upheld the denial of benefits by the Division of Social Services, also on the grounds that Mrs. Bowden's resources exceeded the limits for a nursing home program as a result of the spousal impoverishment resource calculations under 42 U.S.C. § 1396r-5. In re: Annie V. Bowden (Del. Division of Social Services, July 13, 1992). P. 42.

Prior to her death at age 84 on September 28, 1992, Mrs. Bowden had been institutionalized at a non-state health care facility for one year and several months inclusive. Her care bills at this health care facility were approximately $120,000.00 per year. The costs of Mrs. Bowden's nursing care had exhausted her assets at the time her application for Medicaid Program benefits was presented.

Prior to the submission of this application, Mrs. Bowden had been determined as medically eligible for such benefits. However, the Division of Social Services denied Mrs. Bowden's application for failure to meet the financial resource limits. In calculating the resource limits the Division of Social Services included the full value of Mr. Bowden's assets. Mr. Bowden, however, steadfastly refused to use any of his assets to pay for Mrs. Bowden's nursing home care bills incurred prior to her death on September 28, 1992. Petitioners were substituted as a party in the proceedings after Mrs. Bowden's death.

The petitioners, in their briefs upon appeal to the Superior Court of the State of Delaware in and for Sussex

County and in their briefs on appeal to the Supreme Court of the State of Delaware, contended that the federal statute involved, 42 U.S.C.§ 1396r-5 (c)(3) qualifies Annie V. Bowden for Medicaid Program benefits. The provisions of 42 U.S.C.§ 1396r-5 (c)(3) are exceptions to what would otherwise make the institutionalized spouse ineligible for Medicaid Program benefits. The third exception states that an institutionalized spouse is not to be denied program benefits if "the State determines that denial of eligibility would work an undue hardship". 42 U.S.C.§ 1396r-5 (c)(3)(C).

The Superior Court, in affirming the denial of benefits to Annie V. Bowden, applied the statute to Mrs. Bowden's situation and found that no undue

hardship resulted from the denial of benefits to Mrs. Bowden. Bowden v. Del. Dep't of Health and Social Services, Del. Super, C.A. No. 92A-08-001, Graves, J., (Aug. 25, 1993). The Superior Court interpreted the standards set forth in 42 U.S.C.§ 1396r-5 (c)(3) as a means to prevent hardship solely to the non-institutionalized spouse. P. 39. The Court did not consider the substantial evidence in the record which indicated that Annie Bowden would have suffered undue hardship as a result of the denial of her application because of her husband's refusal to pay for her care.

Petitioners subsequently filed an appeal with the Supreme Court of the State of Delaware. That Court, by Order dated March 18, 1994, affirmed the decision of the Superior Court. Bowden v.

Del. Dep't of Health and Social Services, Del. Supr, No. 351, 1993, Veasey, C.J., (Mar. 18, 1994). P. 21. On May 3, 1994, the Supreme Court of the State of Delaware issued an Order denying petitioners' motion for rehearing and motion for reargument en banc. Bowden v. Del. Dep't of Health and Social Services, Del. Supr, No. 351, 1993, Veasey, C.J., (May. 3, 1994). P. 19.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to resolve substantial questions arising from the interpretation of a federal statute by a state. The correct interpretation of 42 U.S.C. § 1396r-5 (c) and its "undue hardship" exception to what would otherwise result in a denial of federal Medicaid Program benefits is a question of national importance that

needs to be addressed by this Court. It is a case of first impression involving the application of § 1396r-5(c)(3) to determining the availability of Medicaid benefits. The interpretation placed upon the statute by the Superior Court of Delaware, which considered only whether the non-institutionalized spouse would suffer hardship, was directly contrary to the Congressional intent behind the statute.

Medicaid is a program of medical assistance to eligible needy persons. Medicaid in Delaware covers a variety of medical benefits, including nursing home care like that given Annie V. Bowden, as long as the person receiving assistance remains eligible both medically and financially. An applicant must not have monthly income in excess of a certain

amount and, in addition, must not have non-exempt resources in excess of a certain amount. The Medicaid system takes into account the financial situation of both the institutionalized spouse and the spouse who remains at home, the community spouse. Concern about the community spouse led Congress to create a new system of allocation of income and resources between the community spouse and the institutionalized spouse, effective October 1, 1989.

The relevant federal statute involved in this case, 42 U.S.C. § 1396r-5, contains a complex formula for computation of the community spouse resource allowance. Resources of one spouse are generally considered available to the other spouse. 42 U.S.C. § 1396r-5

(c)(2). Resources in the community spouse setting do not include all assets of a couple. The residence of a community spouse, as well as some other assets, are excluded from these calculations. In addition to the above, a community spouse is allocated a resource allowance of $68,700.00. It was agreed at all stages of the proceedings below that Annie V. Bowden did not qualify for benefits under these general rules; however, 42 U.S.C. § 1396r-5 (c)(3) provides that an institutionalized spouse who would be declared ineligible for benefits under the spousal resource calculations should not be declared ineligible "where the state determines that denial of eligibility would work an undue hardship", so long as the "institutionalized spouse has assigned to

the state any right of support of the community spouse". As a result of the operation of 42 C.F.R. § 435.604(a) (1990), the Division of Social Services received from Annie V. Bowden the assignment of her rights to support from Ollie Bowden. Once these support rights were assigned, if Annie V. Bowden had otherwise qualified for Medicaid benefits, she would not have been ineligible for Medicaid benefits. The testimony at the hearing before the Division of Social Services indicated that, except for Mr. Bowden's assets, Annie V. Bowden would have been financially eligible to participate in the Medicaid Program. It was undisputed that Mr. Bowden refused to pay for his wife's care. Mrs. Bowden should not have been declared ineligible for Medicaid

Program benefits by virtue of the provisions of 42 U.S.C. § 1396r-5(c)(3). Mr. Bowden's refusal to provide for his wife's care, together with the fact that the cost of her care was approximately $120,000.00 per year, supported a finding that the denial of benefits worked on undue hardship on Annie V. Bowden.

The Delaware Superior Court, however, did not consider the provisions of 42 U.S.C. § 1396r-5 (c)(3) with reference to whether the denial of eligibility worked an undue hardship on Annie V. Bowden, the medically and financially needy institutionalized spouse the statute was designed to protect. Rather, the Superior Court considered the effect a denial of benefits would have on the non-institutionalized community spouse.

The Superior Court, in its decision affirming the denial of benefits, stated that "[t]he standards in § 1396r-5 were established to prevent hardship to the non-institutionalized spouse so the logical conclusion is that if the institutionalized spouse does not qualify for benefits ... there is no hardship for either spouse". P.39. The Superior Court misinterpreted the provisions of 42 U.S.C. § 1396r-5 in concluding that no undue hardship resulted for either spouse from the denial of benefits. The statute clearly states that an institutionalized spouse is not to be denied Medicaid benefits if to do so would result in an undue hardship for that institutionalized spouse. The statute does not, as the Superior Court felt, require the state to consider whether there would be resulting

undue hardship on the public assistance system. The Superior Court determined that "Mr. Bowden's refusal to pay for the nursing home care of his wife works an undue hardship on the system of public assistance established to help those who fall below the subsistence level". P. 40. The Court failed to consider the evidence in the record, in light of 42 U.S.C. § 1396r-5, and realize that the denial of Medicaid benefits did result in undue hardship for Annie V. Bowden.

The Superior Court failed to consider the mandates of 42 U.S. C. § 1396r-5 and the Congressional purpose of protecting those medically needy individuals who would suffer should they be denied Medicaid benefits. Furthermore, the applicability of §1396r-5(c)(3) to situations such as Annie

Bowden's was reinforced by the 1993 Omnibus Budget Reconciliation Act, which directed the states to consider any resulting undue hardship when determining whether an otherwise ineligible institutionalized spouse should, nonetheless, be declared eligible for Medicaid benefits, Omnibus Budge Reconciliation Act, Pub. L. No. 103-66 (Aug. 10, 1993). The Court left unanswered the question, one of significant, national importance, of how a state is to apply the provisions of 42 U.S.C. § 1396r-5 when deciding whether to award Medicaid Program benefits. For these reasons, petitioners respectfully request this Court grant this writ of certiorari so that this important question of federal law can be settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John E. Messick
(Counsel of Record)

Harold W.T. Purnell, II
TUNNELL & RAYSOR, P.A.
Pine and Race Streets
P.O. Box 151
Georgetown, Delaware 19947

JUNE 16, 1994

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

REDA F, PARSONS and PRESTON L. BOWDEN, CO-EXECUTORS OF THE ESTATE OF ANNE V. BOWDEN,	:	
Plaintiffs Below, Appellants,	:	No. 351, 1993
v.	:	Court Below: Superior Court of the State of Delaware in and for Sussex County C.A. No. 92A-08-001
DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION SOCIAL SERVICES,	:	
Defendant Below, Appellee.	:	

Submitted: March 30, 1994
Decided: May 3, 1994

Before VEASEY, Chief Justice, MOORE, WALSH, HOLLAND, and HARTNETT, Justices, constituting the Court en Banc.

ORDER

This 3rd day of May 1994, the Court having considered the appellants' motion for reargument and motion for a rehearing en Banc dated March 30, 1994, and it appearing that the motions are without merit,

NOW, THEREFORE, IT IS ORDERED that the appellants' motion for reargument and motion for a rehearing en Banc be, and the same hereby are,

DENIED.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

REDA F, PARSONS and PRESTON L. BOWDEN, CO-EXECUTORS OF THE ESTATE OF ANNE V. BOWDEN,	:	
Plaintiffs Below, Appellants,	:	No. 351, 1993
v.	:	Court Below: Superior Court of the State of Delaware in and for Sussex County C.A. No. 92A-08-001
DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION SOCIAL SERVICES,	:	
Defendant Below,	:	

Submitted: March 15, 1994
Decided: March 18, 1994

Before VEASEY, Chief Justice, MOORE and WALSH, Justices.

ORDER

This 18th day of March 1994, the Court having considered this matter on briefs, and having concluded that the same should be affirmed on the basis of and for the reasons stated by the Superior Court in its well-reasoned decision dated August 25, 1993,

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice

SUPERIOR COURT

OF THE

STATE OF DELAWARE

August 25, 1993

Harold W. T. Purnell, II, Esquire
Tunnell & Raysor
P.O. Box 151
Georgetown, Del. 19947

James F. Kelleher, Esquire
Department of Justice
820 North French Street
Wilmington, Del. 19801

Re: Annie V. Bowden v. Delaware Department of Health and Social Services Division of Social Services
Civil Action No. 92A-08-001

Date Submitted: June 16, 1993
Date of Decision: August 25, 1993

Dear Counsel:

CASE POSTURE

This appeal, filed pursuant to 31 Del. C. §520, contests a decision of the

Department of Health and Social Services ("DH&SS"), wherein the application by Annie V. Bowden for the bestowal of Medicaid benefits by the State was denied.

FACTS

Annie V. Bowden, 84 years old on the date of her death, September 29, 1992, was institutionalized at Nanticoke Hospital originally, and then at Harbor Health Care Center ("Harbor Center"), a nursing home, for one year and several months inclusive. Personal maintenance at Harbor Center cost approximately $120,000.00 per year. The separate assets of Mrs. Bowden were exhausted in payment of medical bills, except a parcel of land for which all rights, title and interest were transferred to Mr. Ollie J. Bowden, husband of the applicant, in

October of 1991, and for which subsequent transfer was completed through an irrevocable trust naming a daughter as beneficiary.[1]

On May 6, 1992, an application for Medicaid was filed on Mrs. Bowden's behalf by Mr. Bowden, Plaintiff in this action. [2] It was denied on May 8, 1992

---

[1] The transfer of this land is not in issue at this time because it was not raised on appeal to the Hearing Officer. See, e.g., 31 Del. C. §520 (stating that an appeal shall be on the record without a trial de novo). The decision of the Hearing Officer states that denial of benefits would also have been on these grounds if DH&SS had been informed of this transfer.

[2] Mr. Bowden survives as Plaintiff in this action despite the intervening death of his wife. See 31 Del. C. §502 (defining "applicant" as a person on whose behalf an application for assistance is submitted). See also 31 Del. C. §520 (allowing an appeal of a decision by DH&SS to be filed by anyone who faces financial detriment due to an unfavorable determination by DH&SS). The Plaintiff here is affected by virtue of his expected contribution to the

due to the existence of resources in Mr. Bowden's possession which exceeded prescribed limits under the program. Although these calculations included all available resources of Mr. Bowden, he has refused to exhaust any of his assets to pay the medical bills incurred by his wife prior to her death. The decision of the DH&SS was appealed by Mr. Bowden under the administrative fair hearing procedure, whereupon the conclusion of DH&SS to deny coverage was upheld by the Hearing Officer on July 13, 1992.

Plaintiff comes before this Court with an appeal of the decision of the Hearing Officer contending that the Officer committed an error of law in denying Medicaid coverage. More specifically, Plaintiff argues that by

---

maintenance of Mrs. Bowden while living.

virtue of §1396r-5 of the Social Security Act,[3] the DH&SS failed to produce a correct accounting of resources properly considered when determining eligibility of an institutionalized spouse, which essentially translates as a direct challenge to the process used by DH&SS when determining eligibility of the applicants.

Conversely, the Defendant, DH&SS, urges the Court to affirm the decision of the Hearing Officer, asserting that the appropriate standard of review is an examination of the record for substantial evidence in support of the Officer's

---

[3] 42 U.S.C. §1396r-5 was added following the adoption of the Medicare Catastrophic Coverage Act §303(a), which became effective on October 1, 1989. The purpose of the section is to allow a community spouse to retain sufficient funds for his or her maintenance when eligibility of the insitututionalized spouse is calculated.

findings.

DISCUSSION

Jurisdiction of this Court to review decisions of the DH&SS stems from 31 Del. C. §520, which reads in pertinent part:

> Any applicant for or recipient of public assistance benefits under this chapter or Chapter 6 of this title against whom an administrative hearing decision has been decided may appeal such decision to the Superior Court if the decision would result in financial harm to the appellant. ...The appeal shall be on the record without a trial de novo. The Court shall decide all relevant questions and all other matters involved, and shall sustain any factual findings of the administrative hearing decision that are supported by substantial evidence on the record as a whole. The notice of appeal ... shall be in the form and according tot he procedure as shall be provided by the rules of the Superior Court.

Since the only qualification necessary prior to the application of this statute is the need for financial harm as a result of the administrative

decision, Plaintiff correctly files this appeal where denial of Medicaid coverage would create a monetary detriment.

Appropriate standard of review is the examination of the record for substantial evidence to support the findings of fact made by the Hearing Officer and the absence of any errors of law. Collins v. Eichler, Del. Super., C.A. No. 90A-JL2, Lee, J. (March 25, 1991). Our review is necessarily aimed at the potential for misapplication of governing law by a State when determining the qualifications of applicants for assistance through the Medicaid program. Only if the procedure of eligibility determination is legally sound do we proceed to the question of the sufficiency of evidence to support the decision.

To determine if the decision by the DH&SS reflects sound legal principles, we must have an understanding of the province of the State of Delaware and its relevant agencies in the administration of the federally-funded program of public assistance. Therefore, a brief discussion of the framework of the Social Security program is essential.

The first tier of the system is the provision of federal funds to States that finance medical care for its categorically needy citizens.[4] This group of recipients was restructured in 1972 through consolidation under the Supplemental Security Income for the Aged, Blind and Disabled ("SSI"), 42

---

[4] The term categorically needy is assigned to persons falling within one of four prescribed classes of need: aged, blind, disabled, and certain qualifying families with dependent children

U.S.C. §1381 et seq. (1972). The federal government also mandated the eligibility requirements for participation in the SSI program, 42 U.S.C. §1382 et seq., and ruled that anyone eligible to participate in this program was automatically qualified to receive Medicaid benefits. In an attempt to prevent the destitution of participating states, the federal government created a second tier which allowed states to activate a §209(b) option,[5] permitting them to offer Medicaid coverage only to those persons who would have qualified for benefits under the system employed prior to the passage of the 1972 adjustments. Also, as a third tier, states wishing to

---

[5] The §209(b) option is set forth in 42 U.S.C. §1396a(f). Delaware has not chosen this option so further elaboration on this tier is unnecessary.

enlarge, rather than restrict, their program of Medicaid assistance could do so by implementing an optional categorically needy class. 42 U.S.C. §1396a(a)(10)(C); see 42 C.F.R. §§435.200-435.231 (1980); Herweg v. Ray, 455 U.S. 265 (1982). For instance, eligibility for this extended coverage would be provided to individuals (1) who would be eligible for, but for some reason are not receiving, SSI benefits and (2) who would be eligible for SSI benefits but for their institutionalized status, provided they satisfy state eligibility criteria. 42 C.F.R. §§435.210-435.211 (1980); Herweg at 268-69.

Eligibility criteria for the SSI program are controlled by federal regulations insuring for uniformity of

eligible participants throughout all states opting for participation in the SSI program. 42 U.S.C. §1382 et seq. Also, because participation in the Medicaid program is automatic for SSI recipients, eligibility standards are also federally mandated for those applicants. However, states are granted some leeway in establishing a system of eligibility standards when they opt for inclusion in the optional categorically needy program; as long as the criteria comport with the federal regulations governing eligibility, they will be deemed valid and enforceable. Schweiker v. Gray Panthers, 453 U.S. 34, 36-67 (1981). Essentially this requires states to maintain eligibility standards that are at least as restrictive as those used by the federal government.

Most of the states opting for an additional Class of Medicaid beneficiaries implemented formulas for determining financial eligibility for Medicaid using certain rules which deemed income and resources of one spouse as available to the other for assistance in payment of medical costs. The Supreme Court in Herweg decided that a state statute which allows assets between spouses to be deemed was legally permissible where it could be reconciled with similar federal regulations. As a result of this latitude granted to the states and fearing destitution of a spouse left in the community where he or she was responsible for sustaining himself or herself as well as providing support for an institutionalized spouse, Congress passed §1396r-5 within the

Medicare Catastrophic Coverage Act of 1988. Essentially, this provision allows the non-institutionalized spouse to retain one-half of the combined resources of the couple, up to a current limit of $68,700.00, without jeopardizing the institutionalized spouse's opportunity to qualify for Medicaid coverage.

Relevant to our inquiry is the fact that Delaware has opted to be classified as an SSI state with additional coverage to be provided under the optional categorically needy provision. Brown v. Schramm, De. Super., C.A. No. 80M-FE2, Tease, J. (September 16, 1981). Since Mrs. Bowden did not receive SSI benefits and Mr. Bowden does not claim that Mrs. Bowden would qualify as an SSI recipient, Medicaid coverage is not automatic in her case. Thus, her only hope for

eligibility lies in the potential application of the optional categorically needy category of aid, governed by state-mandated qualifications and §1396r-5. Determining which provision applies requires this Court to simply look at the status of the petitioning couple. Only when one spouse is institutionalized, as is the case here, does the federal regulation outlined in §1396r-5 apply.[6]

Standards for deeming resources in a household where one spouse is institutionalized and the other is not

---

[6] §1396r-5(a)(1) provides that this section supersedes other applicable provisions such as §1396a(a)(17), which outlines the requirements for state eligibility plans. Thus, the federal system, by virtue of §1396r-5, is mandating specific treatment in the event that one spouse is institutionalized. See also Whitehouse v. Ives, D. Me., 736 F.Supp. 368 (1990) (outlining respective roles of state and federal governments in administration of the Medicaid program).

were liberalized from the stricter predecessor provision in §1396a(a)(17) with the passage of §1396r-5. It is from this later, more relaxed standard that Plaintiff now wishes to be liberated. Because Delaware has adopted the federally-mandated eligibility provisions of §1396r-5,[7] and because Plaintiff failed to cite the appropriateness of applying a different criterion, the DH&SS properly determined that the resources of the couple, with the permissible exclusion for maintenance of the community spouse, exceed the permissible limits for the granting of Medicaid benefits.

Plaintiff attempts to avail himself

---

[7] See Department of Social Services Manual §410. This provision outlines the spousal impoverishment resource allocation process, which mirrors the federal standard contained in §1396r-5.

of the exceptions to ineligibility contained in §1396r-5(c)(3).[8] However, that provision prevents a ruling of ineligibility where the institutionalized spouse has assigned to the State all rights of support from the commmuntiy spouse and denial would work an undue hardship for the institutionalized

---

[8] §1396r-5(c)(3) involves the assignment of support rights and reads as follows:

> The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where-
>
> (A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;
> (B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or
> (C) the State determines that denial of eligibility would work an undue hardship.

spouse. This provision does not act as a fall-back position for a community spouse unable to make a defense because the joint resources top the threshold set for eligibility, leaving the community spouse with nothing to plead but undue hardship. The standards in §1396r-5 were established to prevent hardship to the non-institutionalized spouse so the logical conclusion is that if the institutionalized spouse does not qualify for benefits, either by virtue of the existence of excessive assets or through failure to satisfy the provisions regarding the assignment of support rights in §1396r-5(c), there is no hardship posed for either spouse.

Testimony before the Hearing Officer reveals an earlier willingness of Plaintiff to provide support to his wife.

However, the amount spent did not serve to reduce the assets of the couple sufficient for Mrs. Bowden to become eligible for assistance. Substantial evidence of the existence of excessive assets in Mr. Bowden's possessing can be found both on the calculation sheets used by DH&SS to determine total assets based on information provided by the applicant, and in witness testimony by the caseworker, Ann Bollinger, before the Hearing Officer. Thus, Mr. Bowden's refusal to pay for the nursing home care of his wife works an undue hardship on the system of public assistance established to help those who fall below the subsistence level.

CONCLUSION

The DH&SS did not commit any legal error in the application of its Medicaid

eligibility requirements to Mrs. Bowden's claim for benefits. Additionally, substantial evidence exists on the record to uphold the subsequent denial of assistance where the joint assets of the Bowdens exceeded the published limit for qualification. The standard of review outlined in 31 Del. C. §520 thus satisfied, the Court hereby affirms the decision of the Hearing Officer to deny the application.

Very truly yours,

/s/ T. Henley Graves
T. Henley Graves

THG:jmc

oc: Prothonotary's Office

The Delaware Code (31 Del. C. 520) provides for judicial review of hearing decisions. In order to have a review of this decision in Court, you must file a notice of appeal with the clerk (Prothonotary) of the Superior Court in the county in which you live within 30 days of the date of the decision. An appeal may result in a reversal of the decision. The clerk can help you file the appeal.

DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF SOCIAL SERVICES

In re:	DCIS No.:
Annie V. Bowden	102045

Appearances: Ollie J. Bowden, Claimant's spouse

Reda F. Parsons, Witness for the Claimant

Harold W. T. Purnell II, Counsel for the Claimant

James Kelleher, Deputy Attorney General, Counsel for the Division of Social Services, (DSS)

Louise King, Social Worker Supervisor, (DSS)

Ann Bollinger, Social Worker, (DSS)

I

The claimant, a patient at the Harbor Healthcare & Rehabilitation Center in Lewes, contends that she is otherwise qualified for Medicaid Program benefits but for the resource rules including the community spouse resource assessment rules and that, if her spouse refuses to pay for her care, her application for Medicaid Program benefits should not be denied.

DSS contends that the resources of the claimant and her spouse, Ollie Bowden, exceed the limits set for participation in the Medicaid Program.

Exhibit #1 (approximately 5 pages) is a photocopy of a document dated May 24, 1984. In this document the claimant gives Reda F. Parsons and Preston L.

Bowden power of attorney to manage her affairs.

Exhibit #2 (approximately two pages) is a photo copy of a document dated October 25, 1991. This copy is offered by DSS at the hearing on June 19, 1992. In the document the claimant conveys her interest in approximately 51-3/4 acres of land in Sussex County to her spouse Ollie Bowden in consideration of the sum of one dollar.

Exhibit #3 (approximately 13 pages) is a photocopy of an irrevocable trust agreement made October 25, 1991 between Ollie J. Bowden and Reda F. Parsons. This is proffered at the hearing on June 29, 1992 by the claimant's spouse as evidence of the status of real property owned by him. It is included under 42 CFR 431.244 (b)(2).

Exhibit #4 is a photocopy of a statement made outside this hearing by Reda Parsons. The statement is dated November 26, 1991 and withdraws an application for benefits. This document was offered by DSS at the hearing on June 29, 1992.

Exhibit #5 (approximately 2 pages) is a photocopy of a document dated November 27, 1991. This copy is offered by DSS at the hearing on June 29, 1992. In the document Ollie Bowden conveys his interest in certain real property to Reda F. Parsons as trustee under an irrevocable trust agreement for the sum of one dollar.

Exhibit #6 (approximately 21 pages) is a photocopy of a revocable living trust agreement of Ollie J. Bowden as amended January 31, 1992. This is

included as part of this hearing decision record pursuant to the (federal) rule at 42 CFR 431.244 (b)(2) and, in the State hearing rules, at 5000 DSSM, over objection by DSS for relevance.

Exhibit #7 (approximately 15 pages) is a photocopy of pages of an unsigned DSS Medicaid application form for Annie Bowden dated May 6, 1992. This was offered by the claimant at the hearing on June 29, 1992.

Exhibit #8 is a photocopy of a DSS form[9] executed by Reda Parsons dated May 6, 1992. This form authorizes DSS to "request and receive" information about Annie Bowden. This is offered by DSS at the hearing on June 29, 1992 and is

---

[9] Recognition of this form should not be considered as an approval of its use to secure information about Medicaid Program applicants without specific authorization.

included under 42 CFR 431.244 (b)(2).

Exhibit #9 is a photocopy of a DSS "Spousal Impoverishment Resource Calculation Sheet" completed by Anne Bollinger and dated May 7, 1992. This is a business record which is admitted as evidence of a calculation by DSS of a community spouse resource assessment as discussed below.

Exhibit #10 is a photocopy of a letter from Ann Bollinger to Ollie Bowden dated May 7, 1992. This letter references the May 7, 1992 spousal impoverishment calculation sheet.

Exhibit #11 (approximately three pages) is a photocopy of reproductions of DSS client information system screens which reconstruct a denial notice dated May 8, 1992 and sent to Reda Parsons. This notice does not contain a citation

to a rule or a value of the resources which were the basis for the denial action.

Exhibit #12 is the claimant's request for a fair hearing. This request is signed for the claimant by Reda Parsons and is date stamped as first received by DSS on May 15, 1992.

Exhibit #13 (two pages) is a DSS hearing summary dated May 22, 1992. This is admitted as a business record of DSS.

Exhibit #14 (approximately 5 pages) is a photocopy of a reproduction of DSS client information system screens which reconstruct a denial notice dated May 22, 1992. This is apparently a rehabilitated version of the May 8, 1992 notice. (See Exhibit #11) This was offered by DSS at the hearing on June 29, 1992 and is included as part of the hearing record

Pars
evic

Stat
a 1
owne
This
reso

Mell
conf
cert
stat
is o
at t
inclu

of D
1991.
asset

ons. This is offered by DSS as ence of a resource.

Exhibit #18 is a photocopy of a e of Delaware certificate of title to 987 Lincoln, tag # 247838, jointly d by Ollie Bowden and Reda Parsons. is offered by DSS as evidence of a urce.

Exhibit #19 is a photocopy of a on bank statement and renewal irmation notice for an investment ificate of Ollie J. Bowden. The ement is dated July 16, 1990. This ffered as evidence of assets by DSS the hearing on June 29, 1992 and is uded under 42 CFR 431.244 (b)(2).

Exhibit #20 is a photocopy of a Bank Delaware statement dated November 5, . This is offered as evidence of ts by DSS at the hearing on June 29,

I

The claimant, a patient at the Harbor Healthcare & Rehabilitation Center in Lewes, contends that she is otherwise qualified for Medicaid Program benefits but for the resource rules including the community spouse resource assessment rules and that, if her spouse refuses to pay for her care, her application for Medicaid Program benefits should not be denied.

DSS contends that the resources of the claimant and her spouse, Ollie Bowden, exceed the limits set for participation in the Medicaid Program.

Exhibit #1 (approximately 5 pages) is a photocopy of a document dated May 24, 1984. In this document the claimant gives Reda F. Parsons and Preston L.

Bowden power of attorney to manage her affairs.

Exhibit #2 (approximately two pages) is a photo copy of a document dated October 25, 1991. This copy is offered by DSS at the hearing on June 19, 1992. In the document the claimant conveys her interest in approximately 51-3/4 acres of land in Sussex County to her spouse Ollie Bowden in consideration of the sum of one dollar.

Exhibit #3 (approximately 13 pages) is a photocopy of an irrevocable trust agreement made October 25, 1991 between Ollie J. Bowden and Reda F. Parsons. This is proffered at the hearing on June 29, 1992 by the claimant's spouse as evidence of the status of real property owned by him. It is included under 42 CFR 431.244 (b)(2).

Exhibit #4 is a photocopy of a statement made outside this hearing by Reda Parsons. The statement is dated November 26, 1991 and withdraws an application for benefits. This document was offered by DSS at the hearing on June 29, 1992.

Exhibit #5 (approximately 2 pages) is a photocopy of a document dated November 27, 1991. This copy is offered by DSS at the hearing on June 29, 1992. In the document Ollie Bowden conveys his interest in certain real property to Reda F. Parsons as trustee under an irrevocable trust agreement for the sum of one dollar.

Exhibit #6 (approximately 21 pages) is a photocopy of a revocable living trust agreement of Ollie J. Bowden as amended January 31, 1992. This is

included as part of this hearing decision record pursuant to the (federal) rule at 42 CFR 431.244 (b)(2) and, in the State hearing rules, at 5000 DSSM, over objection by DSS for relevance.

Exhibit #7 (approximately 15 pages) is a photocopy of pages of an unsigned DSS Medicaid application form for Annie Bowden dated May 6, 1992. This was offered by the claimant at the hearing on June 29, 1992.

Exhibit #8 is a photocopy of a DSS form[9] executed by Reda Parsons dated May 6, 1992. This form authorizes DSS to "request and receive" information about Annie Bowden. This is offered by DSS at the hearing on June 29, 1992 and is

---

[9] Recognition of this form should not be considered as an approval of its use to secure information about Medicaid Program applicants without specific authorization.

included under 42 CFR 431.244 (b)(2).

Exhibit #9 is a photocopy of a DSS "Spousal Impoverishment Resource Calculation Sheet" completed by Anne Bollinger and dated May 7, 1992. This is a business record which is admitted as evidence of a calculation by DSS of a community spouse resource assessment as discussed below.

Exhibit #10 is a photocopy of a letter from Ann Bollinger to Ollie Bowden dated May 7, 1992. This letter references the May 7, 1992 spousal impoverishment calculation sheet.

Exhibit #11 (approximately three pages) is a photocopy of reproductions of DSS client information system screens which reconstruct a denial notice dated May 8, 1992 and sent to Reda Parsons. This notice does not contain a citation

to a rule or a value of the resources which were the basis for the denial action.

Exhibit #12 is the claimant's request for a fair hearing. This request is signed for the claimant by Reda Parsons and is date stamped as first received by DSS on May 15, 1992.

Exhibit #13 (two pages) is a DSS hearing summary dated May 22, 1992. This is admitted as a business record of DSS.

Exhibit #14 (approximately 5 pages) is a photocopy of a reproduction of DSS client information system screens which reconstruct a denial notice dated May 22, 1992. This is apparently a rehabilitated version of the May 8, 1992 notice. (See Exhibit #11) This was offered by DSS at the hearing on June 29, 1992 and is included as part of the hearing record

under 42 CFR 431.244 (b)(2). The notice lists a total of $38,920.00 in resources counted by DSS for Annie Bowden.

Exhibit #15 is a photocopy of a DSS interoffice message dated June 26, 1992. The message discusses "rules on notices." This is offered by DSS at the hearing on June 29, 1992 and is included as part of the hearing record under 42 CFR 431.244 (b)(2).

Exhibit #16 is a photocopy of a State of Delaware certificate of title to a 1990 Chevrolet, tag # 21730, jointly owned by Ollie Bowden and Reda Parsons. This is offered by DSS as evidence of a resource.

Exhibit #17 is a photocopy of a State of Delaware certificate of title to a 1977 Chevrolet truck, tag # C53740, jointly owned by Ollie Bowden and Reda

Parsons. This is offered by DSS as evidence of a resource.

Exhibit #18 is a photocopy of a State of Delaware certificate of title to a 1987 Lincoln, tag # 247838, jointly owned by Ollie Bowden and Reda Parsons. This is offered by DSS as evidence of a resource.

Exhibit #19 is a photocopy of a Mellon bank statement and renewal confirmation notice for an investment certificate of Ollie J. Bowden. The statement is dated July 16, 1990. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #20 is a photocopy of a Bank of Delaware statement dated November 5, 1991. This is offered as evidence of assets by DSS at the hearing on June 29,

1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #21 is a photocopy of a statement from the Bank of Delaware dated November 21, 1991 about the status of cash balances, certificates of deposit and a revocable living trust. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #22 is a photocopy of a portion of a statement covering the period from January 1, 1992 to March 31, 1992. The statement is apparently from the Wilmington Savings Fund Society, Inc. about annuity account #0100233710N with Great Northern Insured Annuity Corp. This is offered by DSS as evidence of assets at the hearing on June 29, 1992 and is included under 42 CFR 431.244

(b)(2).

Exhibit #23 is a photocopy of a statement from Mellon Bank dated January 15, 1992 about certificate # A03860-C. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #24 is a photocopy of a statement from the Bank of Delaware dated July 4, 1991 about account # 00-09073825. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #25 is a photocopy of an account summary from the Bank of Delaware for account # 47-48-001-2002567 for the period from August 30, 1991 through September 30, 1991. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42

CFR 431.244 (b)(2).

Exhibit #26 is a photocopy of a statement from the Bank of Delaware dated September 5, 1991 about account # 00-09073825. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #27 is a photocopy of a statement from the Bank of Delaware dated November 5, 1991 about account # 00-09073825. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #28 is a photocopy of an account statement from the Bank of Delaware for account # 47-48-001-2002567 for the period from February 28, 1992 through March 31, 1992. This is offered

as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #29 is a photocopy of a statement from the Bank of Delaware dated March 4, 1992 about account # 00-09073825. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #30 is a photocopy of a statement dated May 8, 1992 from the Mellon bank on a DSS form dated May 6, 1992 about the designation of account # A03860-C. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #31 is a photocopy of a statement dated May 11, 1992 from the

Wilmington Savings Fund Society on a DSS form dated May 6, 1992 about the existence of accounts owned by the claimant. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #32 is a photocopy of a statement dated May 20, 1992 from the Bank of Delaware on a DSS form dated May 6, 1992 about accounts # 47-48-001-2002567, 00-090-78606, and 00-09073825. This is offered as evidence of assets by DSS at the hearing on June 29, 1992 and is included under 42 CFR 431.244 (b)(2).

Exhibit #33 is a copy of a letter dated May 29, 1992 scheduling this hearing for June 29, 1992. This is admitted as a business record of DSS pursuant to 42 CFR 431.244 (b)(2) as

evidence of a notice of the scope of issues to be decided at the hearing.

II

Annie Bowden has been institutionalized, first at Nanticoke Hospital and later at a non-State nursing facility in Lewes, since June 1991. On or about October 25, 1991, while a patient at the nursing facility, Annie Bowden conveyed her interest in real property to her spouse Ollie Bowden "for consideration of the sum of One Dollar." (Exhibit #2)

On November 26, 1991 the claimant's spouse, Ollie Bowden, and daughter, Reda Parsons, were interviewed at the Milford State Service Center by DSS Medicaid Program eligibility worker Ann Bollinger. DSS obtained Medicaid Program information at this interview including information

about bank assets. The application was "withdrawn" (Exhibit #4) as discussed below.

A second application interview was conducted on or about May 6, 1992.

On May 7, 1992 a letter was sent by Ann Bollinger to Ollie Bowden about the application.

On May 8, 1992 the application was denied based on the value of certain resources. A notice, falling short of generally accepted notice requirements, (Exhibit #11) was sent.

On or about May 15, 1992 the claimant's request for a hearing was received by DSS.

On or about May 22, 1992 DSS sent a rehabilitated denial notice to Reda Parsons.

III

On July 1, 1988, section 303 of the Medicare Catastrophic Coverage Act (MCCA) was enacted to become effective on October 1, 1989. Section 303(a) added section 1924 to the Social Security Act. A purpose of section 1924 is the avoidance of the destitution of the spouse of an institutionalized individual. In general, one-half of a couple's combined resources, up to a current limit of approximately $68,700.00, may be allocated to the spouse who remains in the community without placing the institutionalized spouse's eligibility to participate in the Medicaid Program in jeopardy.

Changes in the federal law were made in the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, 104 Stat. 1388

(1990) or OBRA-90.

The federal law governing Medicaid coverage for institutionalized persons with a "community spouse" calls for the State Medicaid agency, in this case the Delaware Division of Social Services (or DSS), to evaluate resources as of the date of institutionalization on request. Under the law described at 42 U.S.C.A. 1396r-5 (c), DSS is to compute what has been described as a "snapshot" of the resources of the institutionalized and community spouse "as of the beginning of the first continuous period of institutionalization of the institutionalized spouse." If requested, the State must promptly assess and document the total value of the resources of the spouses at the beginning of the first continuous period of

institutionalization and provide a copy of the assessment and documentation to each spouse. Under certain circumstances, the State can require payment of a fee for the reasonable expenses of providing and documenting the assessment. This evaluation is a pre-eligibility assessment process. The purpose of the evaluation is to identify the amount of a resource which may be conserved for the spouse who remains in the community.

Based on the testimony presented at this hearing, I find that Annie Bowden has been institutionalized for a continuous period since June 1991 and that Ollie Bowden is a "community spouse" as that term is used in the statute cited above.

DSS publishes the State spousal

impoverishment rules at Section 460 of the Delaware Medicaid Manual. The federal statute at 42 U.S.C.A. 1396r-5 (c)(2) provides for an "attribution of sources" as follows:

> "In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property---
> (A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and
> (B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits)."

United States Code Annotated, West Publishing Co., 1992,
emphasis supplied.

IV

On the same day (October 25, 1991) that the property described in the deed in Exhibit #2 was conveyed by Annie Bowden to Ollie Bowden, it was transferred by Ollie Bowden to Reda Parson under the terms of an irrevocable trust. (Exhibit #3)

DSS contends at this hearing that information about the real property and the trust accounts was not clearly brought to its attention during the application and that, if it had been clearly brought to the agency's attention, the denial would also have been based on a transfer of the real property.

Based on the evidence and testimony presented at this hearing, I find that DSS was on notice of the existence of the

trust accounts at least in May 1992 and that DSS had opportunity to explore the status of the accounts. According to Mrs. Bollinger's testimony, the transfer of assets rule (which follows 42 U.S.C.A. 1396p (c)) was discussed as early as the November 1991 interview. Also according to Mrs. Bollinger, DSS Medicaid Program eligibility workers send trust account eligibility determinations for further development to "State Office" personnel. DSS does not appear to have considered the ambiguous interspousal transfer provisions in 42 U.S.C.A. 1396p(c)(2)(B)(i). The transfer of assets penalty provision was not offered as a reason for the denial of the application in the DSS denial notice (Exhibit #14) or hearing summary (Exhibit #13).

The claimant asks for a

determination that she is entitled to Medicaid Program eligibility under a "different" rule which disregards the spousal nature of the assets numbered above in their entirety. No specific rule in support of this position was cited at the hearing despite opportunity to do so. The claimant's hearing request (Exhibit #12) does not put DSS on notice of this determination request. The letter scheduling this hearing (Exhibit #33) limits the scope of issues to be decided as a result of the hearing to those stated in the "notice of action", in this case the denial notice, and states: "If you want a hearing on other issues you must file a separate request." Since the request for a hearing does not identify a new or different rule to be considered, the request for a new

determination is denied.

The claimant argues that the assets in question were Ollie Bowden's assets, not assets of his spouse, that the law under Title XIX of the Social Security Act was established to provide benefits to otherwise needy persons, that, except for her marriage, Annie Bowden is an otherwise needy person, that Annie Bowden may assign her support rights to the State, and that the State is free to pursue collection from Mr. Bowden.

DSS recognizes in its May 22, 1992 notice (Exhibit #14) that the claimant is an applicant under 42 CFR 435.231. By operation of the 42 CFR 435.604 (a), DSS must require Annie Bowden to assign her rights to support. DSS would be free to pursue collection from Ollie Bowden if the agency had furnished Medicaid to

Annie Bowden or, pursuant to State law, if she were a patient at a State nursing facility.

There is testimony in the record that Annie Bowden worked during her work years and that she kept at least some of her funds separate form Ollie Bowden's funds. While Delaware Courts may determine what resources constitute "marital property", such a determination is neither required nor relevant under the federal Medicaid law quoted above or under the state rule at Section 460.[10]

Based on the testimony and information at the hearing, I find that DSS determined the value of the Medicaid Program resources at or about the time of the May 1992 application based on

---

[10] See 13 Del. C. Section 1513 and In re: Elwood T. (Del. Division of Social Services, February 28, 1992)

information from Reda Parsons and Ollie Bowden. I find that the basis for the resource determination by DSS is consistent with the law cited above, that the calculation of the assets attributable to Annie Bowden is correct, and that the value of the assets attributed exceeds the $2,000.00 asset limit under the State Medicaid Program rule at Section 410.12 of the DSS medicaid Program rules.

The (Federal) rule at 42 CFR 435.907 requires written, signed applications for Medicaid Program benefits. Based on the testimony presented at the hearing, I find that the claimant's representatives declined to sign an application form for the November 1991 application. I also find that the May 6, 1992 application form (Exhibit #7) is not signed.

For the reasons given above, I find that the decision of the Division of Social Services to deny the claimant's application for Medicaid Program benefits for nursing care is consistent with the applicable State and federal rules. The decision is, therefore, AFFIRMED.

/s/ Roger Waters
HEARING OFFICER

July 13, 1992
DATE

THE FOREGOING IS A FINAL DECISION OF THE DIVISION OF SOCIAL SERVICES.

July 13, 1992
POSTED

RW
cc: Harold W. T. Purnell II
James Kelleher, DAG
FH-1165

42 U.S.C. § 1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

(2) No comparable treatment required

Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1396a(a) of this

title, require such treatment for other individuals.

(3) Does not affect certain determinations

Except as this section specifically provides, this section does not apply to-

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in States and territories

(A) Application in States operating under demonstration projects

In the case of any State which is providing medical

assistance to its residents under a waiver granted under section 1315 of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories

This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services from organizations receiving certain waivers

This section applies to individuals receiving institutional or institutional services from any organization receiving a frail elderly demonstration project waiver under section 9412(b) of the Omnibus Budget Reconciliation Act of 1986 or a waiver under section 603(c) of the Social Security Amendments of 1983.

(b) Rules for treatment of income

(1) Separate treatment of income

During any month in which an institutionalized spouse is in the m institution, except as provided in paragraph (2), no income of the community spouse shall be deemed

available to the institutionalized spouse.

(2) Attribution of income

In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) of this section, except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property

Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the

income otherwise specifically provides-

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property

In the case of a trust-

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections 1396a(a)(17) and 1396p(d) of this title), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust-

(I) if payment of income is made solely to the institutionalized

spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be

considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(C) **Property with no instrument**

In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be

considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) Rebutting ownership

The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources

(1) Computation of spousal share at time in institutionalization

(A) Total joint resources

There shall be computed

(as of the beginning of the first continuous period of institutionalization(beginning on or after September 30, 1989) of the institutionalized spouse)-

(i) the total the resources to the extent either the insitutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value

(B) Assessment

At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of

institutionalization(beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment,

require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section.

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an insititutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws

relating to community property or the division of marital property-

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where-

(A) spouse has assigned to the State any right to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined

In this section, the term "resources" does not include-

(A) resources excluded under subsection (a) or (d) of section

1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse

After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following

order:

(A) A personal needs allowance (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a(r) of this title). In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which-

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

Each State shall establish minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal

to or exceeds-

(i) the applicable percent (described in subparagraph (B) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with sections 9847 and 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4). A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of

publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of-

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under sub-paragraph (A) may not exceed $ 1,500 (subject to adjustment under

subsections (e) and (g) of this section).

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of-

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance under section 2014(e) of Title 7) or, if the State does not use such an allowance, the spouse's

actual utility expenses, exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(e) Notice and fair hearing

(1) Notice

Upon-

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse, each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in

subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of-

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the comp the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section); such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with

respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances

resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance,

there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse.

The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which-

(A) the greatest of-

(i) $12,000 (subject to adjustment under subsection (g) of this section), or, if greater (but not to exceed the amount specified in clause

(ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1) of this section, or (II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; or

(iv) the amount transferred under a court order under paragraph (3); exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

(g) Indexing dollar amounts

For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) of this section shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all

items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who-

(A) is in a medical institution or nursing facility or who (at the option of the State is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 40 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

(Aug. 14, 1935, c. 531, Title XIX, § 1924, as added July 1, 1988, Pub.L. 100-360, Title III, § 303(a)(1)(B), 102 Stat. 754, and amended Oct. 13, 1988, Pub.L. 100-485, Title VI, § 608(d)(16)(A), 102 State=. 2417; Dec. 19, 1989, Pub.L. 101-239, Title VI, § 6411(e)(3),103 Stat.2271; Nov.5, 1990, Pub.L. 101-508, Title IV, §§ 4714(a)-(c), 4744 (b)(1), 104 Stat. 1388-192, 1388-198; Aug. 10, 1993, Pub.L. 103-66. Title XIII, §§ 13611(d)(2), 1343(c)(1), 107 Stat. 627, 647.)